IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-119

SOPHIE RUSKAY, *et al.*,

Petitioners,

versus

CHAUNCEY L. WADDELL, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit (Pet. 1a-21a)* is reported at 552 F. 2d 392 (1977). The opinion of the United States District Court for the Southern District of New York (Pet. 26a-34a) is reported at 342 F. Supp. 264 (1972).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The basis of such jurisdiction is set forth in the Petition.

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* "Pet. ___" refers to pages of the Petition for a Writ of Certiorari and "Pet. ___a" refers to pages of the Appendices to the Petition. "S. App. ___a" refers to pages of the Supplemental Appendix annexed to this Brief in Opposition.

Question Presented

Whether the Court of Appeals erred in finding that the District Court properly dismissed the derivative assertion of corporate claims as barred by a judicially approved settlement of prior shareholder actions on behalf of the same corporation against essentially the same defendants.

Counter Statement of the Case

Petitioners are the plaintiffs in four consolidated shareholder actions instituted in the Southern District of New York (hereinafter the "Ruskay II Actions") derivatively on behalf of United Funds, Inc. ("United"), a mutual fund. They seek review of a judgment of the Court of Appeals for the Second Circuit (Pet. 24a to 34a) which affirmed the dismissal by the District Court (Pet. 26a to 34a) of certain claims which they attempted to assert in such shareholder actions.

The District Court found the prosecution of such claims to be barred by a judicially approved settlement of prior shareholder actions (the "Horenstein/Ruskay Actions") which had also been brought derivatively on behalf of United in the same court against essentially the same parties partly on the basis of the same matters and transactions. The District Court found the claims barred by *res judicata* and by a release given by United on the prior settlement. The Court of Appeals rested its affirmance upon the release, finding it unnecessary to reach the questions of *res judicata* dealt with in the opinion of the District Court (Pet. 10a, 13a).

Petitioners, who either sponsored or failed to oppose the settlement of the prior Horenstein/Ruskay Actions,[1] now seek essentially to challenge in this Court the adequacy of the prior settlement and certain aspects of the procedure by which the settlement hearing was conducted.

A. *Parties and Factual Background*

United is an open-end investment company of the investment type commonly known as a mutual fund. In July of 1969, substantially all of the outstanding shares of its investment advisor, Waddell & Reed, Inc. ("Old W&R") were acquired by a corporation which changed its name to Waddell & Reed, Inc. ("New W&R").

Such acquisition was made pursuant to an agreement between the corporate parent of New W&R and the holders of a majority of the voting stock of Old W&R including the individual Respondents. Since the acquisition would terminate the investment advisory contract of Old W&R by operation of law,[2] the agreement provided that the purchase was conditioned upon obtaining the approval of United's shareholders for a reinstatement of the investment advisory contract with New W&R.[3] Such approval was suc-

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[1] Petitioners were also shareholders of United at the time of the prior settlement which they failed to oppose. In fact, Petitioner Ruskay was a plaintiff in one of the prior Horenstein/Ruskay Actions and a proponent of the settlement of those actions.

[2] Section 15(a)(4) of the Investment Company Act of 1940 (15 U.S.C. §80a) requires, in essence, that any investment advisory contract of a registered investment company provide for automatic termination in the event of an "assignment" of the contract which, by definition, occurs on the transfer of a controlling block of the outstanding voting securities of the investment advisor.

[3] Because substantial amounts of the non-voting stock of Old W&R were publicly held, the agreement provided that a tender

cessfully solicited in June of 1969 pursuant to proxy solicitation materials allegedly prepared by Old W&R and the other Respondents in order to facilitate the tender offer.

B. *The Horenstein/Ruskay Actions*

The Horenstein/Ruskay Actions were instituted derivitively on behalf of United in the Southern District of New York substantially prior to the events leading to the acquisition of Old W&R by New W&R. The defendants in those actions included Old W&R and certain of its affiliates, including essentially the present Respondents. In such actions, it was originally alleged that United's directors were controlled by Old W&R and its affiliates; that brokerage commissions on the execution of United's portfolio transactions had been improperly directed to a wholly-owned subsidiary of Old W&R; that Old W&R had appropriated brokerage "give-ups" which properly belonged to United; and that the defendants in those actions had otherwise misused their fiduciary positions to take advantage of United's brokerage business.

Upon public disclosure of the intended acquisition of Old W&R and the solicitation of United's shareholders to approve the succession of New W&R, the plaintiffs in the Horenstein/Ruskay Actions sought and ultimately obtained judicial permission to serve and file supplemental complaints asserting, on behalf of United, that "a substantial portion" of the price to be received by the Defendant share-

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offer be made to all shareholders of Old W&R to be conditioned on the acquisition of at least 80% of both the voting and non-voting shares of Old W&R and the approval of United's shareholders to the succession of New W&R as the investment advisor of United.

holders of Old W&R belonged to United (S.App. 3a and 12a) and demanding that the proposed sale of the stock of Old W&R be enjoined or that a trust for the benefit of United be impressed on the proceeds of such sale. (S.App. 3a and 13a).

Such supplemental complaints alleged[4] that Respondents Waddell, Merriman and Roach owned or controlled a majority of the voting stock of Old W&R; that they had agreed, in disregard of their fiduciary obligations, to sell their Old W&R stock for $80 per share; that the sale was subject to an approval of the change in control of Old W&R by United's shareholders; that a substantial portion of such selling price was attributable to profits inherent in the position of investment advisor which belonged to United; and that the defendants, including Old W&R, were aiding and abetting the selling shareholders in obtaining $80 per share for their stock in derogation of the rights of United.

C. *The Horenstein/Ruskay Settlement*

By a Stipulation of Settlement, dated December 24, 1969 (S.App. 19a to 24a), the parties to the Horenstein/Ruskay Actions agreed to a settlement subject to judicial approval pursuant to Fed. R. Civ. Pr. 23.1. The terms of the settlement were that Respondents agreed to pay between $535,000 and $650,000 to United on the dismissal, with prejudice to United and its shareholders, of "all claims asserted or which might have been asserted on the basis of any of the matters and transactions alleged in the Horenstein/Ruskay Ac-

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[4] Relevant portions of these pleadings, which are referred to but not contained in the Petition, were reproduced at n. 12 of the opinion of the Court of Appeals (Pet. 11a-12a). The complete text of the supplemental complaints and the answers filed by the Respondents are set forth at S.App. 1a to 18a.

tions" (S.App. 21a). The Stipulation further provided for the execution and delivery by United of a release of "any and all claims" which United "had, now has or may have . . . for or by reason of any of the matters or transactions recited or described" in the pleadings filed by plaintiffs in the Horenstein/Ruskay Actions (S.App. 24a).

Hon. Morris E. Lasker, to whom an application for approval of the settlement was made, convened a hearing on written notice to all shareholders of United to determine whether the proposed settlement was fair, reasonable and adequate. Plaintiff Ruskay appeared by her then counsel in support of the settlement. Although clearly notified[5] that the settlement involved a final disposition of all claims United might have against these Respondents to recover any portion of the price paid for the acquisition of Old W&R,[6] the other Ruskay II plaintiffs, who were share-

[5] Petitioners' contentions are limited to the *content* of the notice of settlement hearing. They do not dispute timely receipt of the notice by the shareholders of United.

[6] The written notice of hearing directed by Judge Lasker to be sent to all shareholders of United (Pet. 35a to 38a) stated, in relevant part, that the settlement intended ". . . to put at rest all contentions or controversies *asserted or which might have been asserted* on the basis of the nature and transactions described or referred to in the various pleadings of the plaintiffs" (Pet. 37a). Relative to the "matters and transactions" referred to in the "various pleadings of plaintiff," the notice disclosed that:

> "By supplemental complaints filed by the *Horenstein* plaintiffs . . . and by the plaintiff in the *Ruskay* action . . ., it is alleged that the defendants Waddell, Merriman, and Roach arranged to sell a majority of the voting shares of W&R held by themselves and members of their families at a price of $80. per share; that such price was largely attributable to the profits derived by W&R from the acts, transactions and practices complained of in their principal complaints; *and that the proposed sale should be enjoined or the proceeds thereof sequestered for the benefit of United. The defendants*

holders of United at that time, neither appeared nor filed objections to the settlement.

At the settlement hearing, there was a thorough and comprehensive review of the record of extensive discovery taken in the Horenstein/Ruskay Actions which included all aspects of the acquisition of control of Old W&R as well as the arrangements by which New W&R became the investment advisor of United. Contrary to the assertions made to this Court (Pet. 9-10), United's alleged right to enjoin or participate in the exercise by the selling shareholder defendants of their property right in the stock of Old W&R was fully discussed.[7]

In connection with such discussion, the Horenstein/Ruskay defendants offered to Judge Lasker an analysis of *SEC* v. *Insurance Securities, Inc.*, 254 F.2d 642 (9th Cir.), *cert. den.*, 358 U.S. 823 (1958) which, prior to the subsequent decision of the Second Circuit in *Rosenfeld* v. *Black*, 445 F.2d 1337 (2d Cir. 1971), *cert. dism.*, 409 U.S. 802 (1972), had been accepted as authority for the proposition that selling shareholders of a mutual fund investment advisor were not accountable to the mutual fund for any part of the proceeds of their sale. Cf. *Rosenfeld* v. *Black*, 319 F. Supp. 891 (S.D.N.Y. 1970).

> involved in such allegations *have denied that they are accountable to United or its shareholders for the selling price of their W&R shares* or that such selling price was dependent on or affected by any of the improprieties or wrongdoing alleged by plaintiffs; and that, after full disclosure on the matter, the shareholders of United, on June 3, 1969, approved the reemployment of W&R as investment adviser and Manager of United in the event that control of W&R should be acquired by the purchaser of their shares." (Emphasis supplied)

[7] Relevant portions of defendants' brief and affidavit in support of the settlement are reproduced at S.App. 25a to 31a.

While the Petitioners prefer to ignore it, the deciding factor, recognized by all counsel and Judge Lasker, which motivated the settlement of the Horenstein/Ruskay Actions was the disposition of all derivative claims which might be asserted against the Respondents for the proceeds of their sale of their shares of Old W&R.[8]

On May 26, 1970, Judge Lasker approved the stipulation of settlement as fair, reasonable and adequate (Pet. 42a-47a) and directed the entry of judgment dismissing the Horenstein/Ruskay Actions with prejudice to United and its shareholders and granting the defendants a full and final discharge of any and all claims or causes of action "which are or might have been asserted with respect to the matters and transactions alleged in said complaints against the defendants . . ." (S.App. 34a). Pursuant to the approved settlement terms, United thereafter delivered a release in the form required by the terms of the Stipulation of Settlement.[9]

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[8] In their brief to Judge Lasker, the Horenstein plaintiffs went out of their way to say as much, stating (S.App. 36a):

> "In all candor, the opportunity of settling this litigation on a basis favorable to United came only at the point at which the shareholders of W&R, the largest of whom are the individual defendants herein, decided to sell W&R to Continental Investors Corporation."

[9] The text of the release which is quoted in the decision of the Court of Appeals (Pet. 5a), reads, in pertinent part, as follows:

> "United Funds, Inc. . . . for good and sufficient consideration . . . does hereby release and forever discharge . . . any and all claims, demands and causes of action arising . . . by reason of any of the matters or transactions recited or described in the complaints, supplemental complaints and/or other pleadings filed by the plaintiffs in the above-entitled actions . . ."

D. *The Ruskay II Actions*

Subsequent to the decision of the Second Circuit in *Rosenfeld* v. *Black* (*supra*), Mrs. Ruskay and the other Petitioners instituted their derivative actions on behalf of United in the Southern District of New York against essentially the same defendants. Following the terminology employed by the *Rosenfeld* decision of the Second Circuit, Petitioners alleged in such actions that the price paid for the acquisition of Old W&R exceeded its net asset value by approximately $62,500,000; that such excess constituted a premium attributable to a sale of the fiduciary position of Old W&R; and that such premium was recoverable by United.

The defendants then moved for summary judgment on the ground that the settlement of the Horenstein/Ruskay Actions barred prosecution of the *Rosenfeld* claims asserted in the Ruskay II Actions. The District Court, Metzner, J., granted the motion (Pet. 26a to 34a) on the grounds of *res judicata* and release. On appeal, the Court of Appeals affirmed (Pet. 1a to 13a) on the basis of the release given by United on the settlement of the Horenstein/Ruskay Actions, finding it unnecessary to reach the issue of *res judicata* (Pet. 13a). An application for reargument on the grounds now presented by the Petition to this Court with a suggestion for rehearing *en banc* was denied for lack of even a request for a vote (S.App. 37a).

ARGUMENT

This case presents no issues of sufficient significance to warrant the intervention of this Court. At most, it deals with the attempt of corporate shareholders to challenge, by new derivative actions, the scope of a judicially approved settlement of prior shareholder actions involving the same matters and transactions on behalf of the same corporation against essentially the same defendants. Petitioners contend that the settlement should be ignored as an improvident or unwitting disposition of a corporate claim on which a substantially geater award might have been obtained under the law subsequently established by the decision of the Second Circuit in *Rosenfeld* v. *Black* (*supra*).

Apparently recognizing the weakness of their attack on the prior settlement[10] which they either sponsored or neglected to oppose, Petitioners now seek to intrigue the attention of this Court by a series of distortions not supported by the record of the case. Thus, they attempt to convey the impressions that (i) the release authorized by the settlement of the Horenstein/Ruskay Actions was a "general release" which operated to extinguish any and all of United's claims against the defendants regardless of their nature or origin; (ii) that the supplemental complaints in the Horenstein/Ruskay Actions made no reference to the matters and transactions on the basis of which

[10] A change in controlling law, such as the decision of the Second Circuit, is an obviously inadequate basis on which to attack the final judgment given on the settlement of the prior shareholder actions, *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940).

Petitioners seek to assert *Rosenfeld* claims in their Ruskay II Actions; (iii) that Judge Lasker, in his consideration of the settlement, was never made aware of the nature, existence and merits of the supplemental claims of the Horenstein/Ruskay plaintiffs to recover part of the proceeds of the sale of Old W&R stock; and (iv) that United's shareholders were not given adequate notice of the substance and effect of the proposed settlement. Even assuming that a case fairly presenting such issues would warrant review by this Court, such assertions are unfounded.

Petitioners' argument for a Writ of Certiorari is substantially dependent on mischaracterizing the release executed on the settlement of the Horenstein/Ruskay Actions as a "general release."[11] The impression thus sought to be created is that the Respondents were given total absolution from "unknown and unpleaded" claims.[12] Such impression is belied by a simple reading of the release itself.[13] By its release, United discharged the defendants, not of all claims, but only of claims

> "for and by reason of any of the matters or transactions recited or described in the complaints, supplemental complaints and/or other pleadings filed by the plaintiffs . . ."

[11] Petitioners repeat and rely on this characterization throughout their Petition, variously describing the release as discharging "unknown and unpleaded claims" (Pet. 3, 5), a "blanket adjudication of claims without knowledge or consideration of their existence" (Pet. 4), securing "blanket absolution for undisclosed fiduciary breaches" (Pet. 5) and destroying even "unknown and unpleaded" corporate claims (Pet. 15).

[12] As noted by the majority decision of the Court of Appeals (fn. 4, Pet. 6a), even a general release is not necessarily inappropriate in the settlement of derivative actions.

[13] Even the dissent of Circuit Judge Mansfield recognized that the release was limited and not "general" (Pet. 19a to 20a).

Equally facile is Petitioners' unsubstantiated assertion that the supplemental complaints in the Horenstein/Ruskay Actions made no reference to the matters and transactions which are the basis of their *Rosenfeld* claims. As noted in the majority opinion of the Court of Appeals (fn.12, Pet. 11a to 12a), both supplemental complaints alleged that Respondents were controlling shareholders of Old W&R who, in violation of their fiduciary obligations to United, sold their shares of Old W&R stock at a price reflecting, at least partly, the profits inherent in their control of United's investment advisor under an agreement by which the sale was conditioned on the succession of New W&R to the position of United's investment advisor.

Even under Petitioners' version of their *Rosenfeld* claim (Pet. 7), such allegations were a clearly sufficient pleading of the claim to comply with the requirements of Rule 8 of the Federal Rules of Civil Procedure. Petitioners' argument (Pet. 8) that the claims asserted by the supplemental pleadings in the Horenstein/Ruskay Actions failed to use the phrase "sale of office" is simply semantic. Every factual element of Petitioners' *Rosenfeld* claim was set forth in the Horenstein/Ruskay supplemental complaints. The absence of an allegation of legal theory, even if it were the case, does not distinguish Petitioners' *Rosenfeld* claim from the supplemental claims asserted in the Horenstein/Ruskay Actions. *Original Ballet Russe, Ltd.* v. *Ballet Theatre, Inc.*, 133 F.2d 187, 189 (2d Cir. 1943); *Ritchie* v. *Landau*, 475 F.2d 151, 156 n.5 (2d Cir. 1973).

Petitioners' argument that, in approving the settlement of the prior Horenstein/Ruskay Actions, Judge Lasker failed to consider the claims asserted by the supplemental

complaints in those actions disregards the record of proceedings on the settlement and is based entirely on the fact that Judge Lasker's written opinion did not contain a detailed discussion of his evaluation of the claims.[14] As has previously been shown, the claims raised by the supplemental complaints in the Horenstein/Ruskay Actions were expressly referred to in the stipulation of settlement; were described in the notice of settlement hearing which Judge Lasker approved; and were separately briefed by defendants' counsel.[15] It is entirely understandable that Judge Lasker did not consider discussion of the supplemental claims to be necessary[16] since, at the time of the settlement, the same District Court had dismissed the complaint in *Rosenfeld* v. *Black*, 319 F.Supp. 891 (S.D.N.Y. 1970) as a

[14] In any event, Petitioners' characterization of the Horenstein/Ruskay plaintiffs' brief (Pet. 40a-41a) as a disavowal of the claims expressed in the supplemental complaints does not appear to be accurate. The supplemental complaints contained prayers for both injunctive and monetary relief. The claims were "moot" only insofar as injunctive relief was concerned, since the sale had already been consummated. And the brief certainly suggests that the payment pursuant to the settlement included any monetary relief that would have been attributable to the supplemental claims.

[15] The opinion of Judge Lasker did, however, refer to the filing of the supplemental complaints (Pet. 42a).

[16] In *Newman* v. *Stein*, 464 F.2d 689, 691-692 (2d Cir. 1972) and *Saylor* v. *Lindsley*, 456 F.2d 896, 904 (2d Cir. 1972), an article by the attorney for Petitioners herein was quoted approvingly. That article stated that "the very purpose of a compromise is to avoid the trial of sharply disputed issues and to dispense with wasteful litigation" and that the court must not turn the settlement hearing "into a trial or a rehearsal of the trial." Through that counsel, Petitioner *now* urges that Judge Lasker was required to write a detailed evaluation of the claims presented by the supplemental complaints, even though all of the parties agreed that they had little or no independent value. If this were necessary, it would carry this "rehearsal of the trial" one absurd step further, to a rehearsal of the decision.

matter of law largely on the authority of *SEC* v. *Insurance Securities, Inc.* (*supra*).

Even if Judge Lasker's approval of the settlement of the Horenstein/Ruskay Actions were still open for review, it could hardly be faulted[17] either on the ground that his written decision failed expressly to discuss each and every matter concluded by the settlement or that he failed to anticipate the subsequent decision of the Second Circuit in *Rosenfeld* v. *Black* (*supra*).[18]

Petitioners' novel constitutional attack on the settlement notice approved by Judge Lasker is as extraordinary as it is unprecedented. They contend that, for due process reasons, a settlement notice must set forth, in meticulous detail,

[17] It is well settled that, in reviewing the appropriateness of a settlement approval, an appellate court will intervene only upon a clear showing that the trial court was guilty of an abuse of discretion. *City of Detroit* v. *Grinnell Corporation,* 495 F.2d 448, 455 (2d Cir. 1974); *Newman* v. *Stein,* 464 F.2d 689, 692 (2d Cir. 1972); *West Virginia* v. *Chas. Pfizer & Co.,* 440 F.2d 1079, 1085 (2d Cir.), *cert. denied sub nom. Cotler Drugs, Inc.* v. *Chas. Pfizer & Co.,* 404 U.S. 871 (1971); *Florida Trailer and Equipment Co.* v. *Deal,* 284 F.2d 567, 571 (5th Cir. 1960). And, as the Court stated in *City of Detroit,* upon which Petitioners rely:

> "Great weight is accorded his [the trial judge's] views because he is exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly." (Quoting *Ace Heating & Plumbing Co., Inc.* v. *Crane Company,* 453 F.2d 30, 34 (3d Cir. 1971)).

[18] As this Court noted in *Protective Committee* v. *Anderson,* 390 U.S. 414, 437 (1968):

> "If, indeed, the record contained adequate facts to support the decision of the trial court to approve the proposed compromises, a reviewing court would be properly reluctant to attack that action solely because the court failed adequately to set forth its reasons or the evidence on which they were based."

both the facts underlying every claim to be settled and every possible legal theory on which the claims might be pursued. According to Petitioners, any slip from their version of the required standards would subject the settlement to later collateral attack by any shareholder.

Apart from the obviously chilling effect any such rule would have on the settlement of derivative actions, the cases cited (Pet. 5) do not support the establishment of any such rule. *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974); *Greenfield* v. *Villager Industries,* 483 F.2d 824 (3d Cir. 1973) and *Girsh* v. *Jepson,* 521 F.2d 153 (3d Cir. 1975) dealt not with the content but, rather, with the timing and manner of service of notices in class actions. In *Papilsky* v. *Berndt,* 466 F.2d 251 (2d Cir.), *cert. den.* 409 U.S. 1077 (1972), the problem was that there was no notice. *Smith* v. *Alleghany Corp.,* 394 F.2d 381, 391 (2d Cir.), *cert. den.* 393 U.S. 939 (1968) holds, to the extent it is apposite, that "where the notice and representation are adequate a settlement decree in a derivative suit—a true class action—is *res judicata.*"

The settlement notice approved by Judge Lasker clearly satisfies any presently accepted standards of adequacy.[19] It contained (Pet. 33a to 38a) a clear and concise statement of the substance of the claims to be settled and the substance

[19] In *Grunin* v. *International House of Pancakes,* 513 F.2d 114 (8th Cir.), *cert. den.* 423 U.S. 864 (1975), upon which Petitioners rely (Pet. 14), the Eighth Circuit approved the scope of a settlement notice despite its alleged inadequacies on the ground that (513 F.2d 122):

> ". . . Class members are not expected to rely upon the notice as a complete source of settlement information. . . . Any ambiguities regarding the substantive aspects of the settlement could be cleared up by obtaining a copy of the agreement as provided for in the first paragraph of the notice."

of the settlement terms. Moreover, it further stated that "[t]he foregoing references to the Stipulation of Settlement, the pleadings and other documents in this action are only summaries." Any shareholder who wished a more thorough explanation or to examine the pleadings or record of discovery in the actions was urged to do so and advised of the place where such papers were available for inspection. If anything, that was more than was required.

Equally imaginative and unprecedented is Petitioners' mischievous suggestion that every settlement of a derivative action is subject to later collateral attack on the ground that the shareholders were not "adequately represented" because the amount of the settlement should have been greater (Pet. 4, 11-15). Rule 23.1 does, indeed, require that a plaintiff, in a derivative action, fairly and adequately represent the interests of the shareholders."[20] Such requirement is not, however, a device for subjectively evaluating a derivative action settlement after the time to appeal the approval of the settlement has passed. Rather, the language of the Rule compels the conclusion that, in the absence of fraud or collusion, neither of which is suggested

[20] This is consistent with the requirement, in the analogous area of class-actions under Federal Rule 23, that a plaintiff must be able to sue in his own right before he may purport to represent a class. *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974); *Indiana Employment Division* v. *Burney*, 409 U.S. 540 (1973); *Bailey* v. *Patterson*, 369 U.S. 31, 32-33 (1962). *Papilsky* v. *Berndt*, 466 F.2d 251, 259-260 (2d Cir.) *cert. den.*, 409 U.S. 1077 (1972) does not support Petitioners' argument. There, the court refused to give *res judicata* effect to the dismissal of a derivative action based on the plaintiff's failure to answer interrogatories. The court held that such a dismissal, in the absence of notice to the other shareholders of the corporation, should not be given *res judicata* effect on anyone other than the defaulting plaintiff. However, in the instant case, adequate notice was given to all shareholders of United.

here, adequate representation is a question to be determined by whether the plaintiff has any disabling conflict with the shareholders or corporation he seeks to represent,[21] or whether he was a shareholder at the time of the transaction complained of[22] and at the time of the suit.[23]

A. *The Decision Below Is Clearly Correct*

The question resolved by the decision of the Court of Appeals was whether the scope of the settlement approved by Judge Lasker included the *Rosenfeld* claim which Petitioners now seek to assert. The parties to the prior Horenstein/Ruskay Actions clearly intended and advised the shareholders of United of their intention (Pet. 37a) "to put at rest all contentions or controversies asserted or which might have been asserted on the basis of the *matters and transactions* described or referred to in the various pleadings of the plaintiff . . ." This clearly included any claims United might have to the proceeds of Respondents' sale of their Old W&R stock.

The majority was clearly correct in deciding that any result other than that arrived at by the District Court would frustrate the intentions of the parties to the settlement and that Petitioners' challenge to the settlement was untimely and inappropriate. The dissent by Judge Mans-

[21] See, e.g. *Nolen* v. *Shaw-Walker Co.*, 449 F.2d 506, 508-509 (6th Cir. 1971); *Shulman* v. *Ritzenberg*, 47 F.R.D. 202, 211 (D.D.C. 1969).

[22] See, e.g. *Weinhaus* v. *Gale*, 237 F.2d 197 (7th Cir. 1956). This is an express requirement of Rule 23.1(1).

[23] See, e.g. *de Haas* v. *Empire Petroleum Co.*, 435 F.2d 1223 (10th Cir. 1970); *Werfel* v. *Kramarsky*, 61 F.R.D. 674 (S.D.N.Y. 1974); *Orenstein* v. *Compusamp, Inc.*, 19 FR Serv. 2d 466 (S.D. N.Y. 1974).

field erred in its overly narrow view of the scope of the terms "matters and transactions." See *Saylor* v. *Lindsley*, 391 F.2d 965, 969 (2d Cir. 1968); *McCarthy* v. *Norex*, 370 F.2d 845, 847 (9th Cir. 1966); *Reiter* v. *Universal Marion Corporation*, 299 F.2d 449, 452-453 (D.C. Cir. 1962); *Moreno* v. *Marbil Productions, Inc.*, 296 F.2d 543 (2d Cir. 1961); *Norman Tobacco & Candy Company, Inc.* v. *Gillette Safety Razor Co.*, 295 F.2d 362, 363-364 (5th Cir. 1961); *Berman* v. *Thomson*, 403 F. Supp. 695, 700-701 (N.D. Ill. 1975); *Wolcott* v. *Hutchins*, 280 F. Supp. 559, 563-564 (S.D.N.Y. 1968).

B. *There Is No Conflict of Decisions*

Girsh v. *Jepson*, 521 F.2d 153 (3d Cir. 1975), cited by Petitioners (Pet. 3-4, 5), holds neither that a "general release" is impermissible for the settlement of derivative litigation nor that the notice of a settlement of such litigation must specify with particularity the theories available for the prosecution of the claims to be settled. At most, that case deals with the timing and manner of service of a notice and not with the content of the notice. Nothing in the case suggests the basis of a conflict between the Third Circuit and the Second Circuit on any issue, let alone any issue relevant to the case at bar.

C. *There Is No Important Question of Federal Law*

Based on their erroneous contention that the release authorized on the settlement of the prior Horenstein/Ruskay Actions was "general," Petitioners urge that the Court undertake in this case to rule on the appropriateness of a "general release" in the settlement of derivative actions. Even if, as Petitioners have failed to demonstrate, this were an important and pressing question of federal law,

it is simply not raised in this case. The release in question was limited to pleaded claims and nothing in the decision of the Court of Appeals suggests any other interpretation.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

September 15, 1977

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ALBERT D. JORDAN
MARTIN S. BERGLAS

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRED HORENSTEIN and JOSEPH SCIUTO,

Plaintiffs,

-against-

WADDELL AND REED, INC., JOE JACK HERRIMAN, CHAUNCY L. WADDELL, CORNELIUS ROACH, UNITED FUNDS, INC., and KANSAS CITY SECURITIES CORPORATION,

Defendants.

SUPPLEMENTAL COMPLAINT

Plaintiffs Demand Trial by Jury

67 Civ. 4175

Plaintiffs, by their attorneys, Bass and Friend, and Monroe L. Inker, as and for their Supplemental Complaint, pursuant to Order of Hon. Harold J. Tyler, dated May 26, 1969, allege the following on information and belief:

Second Cause of Action

62. Plaintiffs hereby reallege and incorporate herein the allegations contained in paragraphs numbered 1 - 61 of the amended complaint verified June 4, 1969.

63. On or about January 30, 1969, defendants Waddell and Herriman, who between themselves and their families own or control a majority of the voting stock of defendant WRI, agreed to sell the stock owned or controlled by them and their families to Continental Investment Corporation, Boston, Massachusetts, (hereinafter referred to as "Continental"), at a selling price of eighty dollars ($80.00) per share.

64. On or about January 30, 1969, the Directors of both United and WRI, including several of the individual defendants herein, by vote approved the proposed tender offer by Continental for more than 80% of WRI's outstanding shares.

Exhibit F

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65. The sale to Continental of the approximately 51% of WRI's voting stock owned or controlled by Defendants Waddell and Merriman would be sufficient to transfer absolute control of WRI to Continental, thereby putting WRI and its wholly-owned subsidiary Defendant KCSC within the ownership and control of Continental.

66. Continental was formed in May 1968 and is located principally in Boston, Massachusetts, and its primary business is insuring mortgage lenders against loss on their residential mortgage loans.

67. With an eye toward their own personal profit and aggrandizement, and in total disregard of their fiduciary and legal obligations to United and United's shareholders, the Defendants Waddell and Merriman have agreed to and are preparing to sell their controlling stock to Continental, and the Defendants United, KCSC, and Roach have acted and continue to act in concert with Waddell and Merriman to facilitate such sale and to facilitate Continental's tender offer for the remaining outstanding shares of WRI.

68. The high price being paid by Continental for stock being tendered or to be tendered to Continental by WRI's shareholders is largely the result of the high price-earnings multiple being accorded WRI's stock by virtue of WRI's excellent growth earnings record of recent years, which excellent growth earnings record is largely the result of the ever-increasing profits being earned by WRI through its wholly-owned subsidiary KCSC, which profits are rightfully and lawfully the property and

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assets of United and which profits, past, present and future, are the subject matter of Count One of this Complaint.

69. Therefore, a substantial portion of the price being offered to WRI's shareholders, including Defendants Waddell and Merriman rightfully and lawfully belongs to United and its shareholders, and Defendants Waddell and Merriman, aided by the other Defendants in this action, are attempting to sell their stock in WRI and thereby to convert to their own use and possession large past and future profits rightfully and lawfully belonging to United.

WHEREFORE, Plaintiffs pray for judgment and order:

A. Permanently restraining and enjoining the Defendants from selling any and all of their stock in WRI to Continental, or from facilitating or assisting Continental's proposed tender offer for shares of WRI, or from taking steps to consummate same; or, in the alternative,

B. Impressing a trust for the benefit of United upon any and all proceeds received or to be received by the Defendant shareholders of WRI as a result of their tender of WRI stock to Continental, and upon any and all profits otherwise realized by any Defendant herein (excluding United) from the aforementioned tender offer or proposed sale or merger.

C. Awarding to the Plaintiffs the costs and disbursements of this action with respect to the matters alleged in this

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Supplemental Complaint and allowing to Plaintiffs reasonable attorneys fees and other necessary fees and expenses incurred in the prosecution of this action; and

D. Providing such other and further relief as to this Court may seem just and proper in the circumstances.

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Bass and Friend
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OXford 7-6664

Monroe L. Inker
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Boston, Massachusetts
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRED HORENSTEIN and JOSEPH SCIUTO, Plaintiffs, - against -	:	67 Civ. 4175
WADDELL & REED, INC., JOE JACK MERRIMAN, CHAUNCEY L. WADDELL, CORNELIUS ROACH, UNITED FUNDS, INC., and KANSAS CITY SECURITIES CORPORATION, Defendants.	:	ANSWER TO SUPPLEMENTAL COMPLAINT.

The defendants Waddell & Reed, Inc. (W&R), Joe Jack Merriman (Merriman), Chauncey L. Waddell (Waddell), Cornelius Roach (Roach) and Kansas City Securities Corporation (KCSC), answer, by their undersigned attorneys, plaintiffs' supplemental complaint, as follows:

62. Repeat and reallege each and every prior denial and affirmative defense heretofore set forth and contained in the answer of said defendants to plaintiffs' amended complaint herein verified June 4, 1968.

63. With respect to the allegations of paragraph 63, deny that Waddell and Merriman, either jointly or separately, own or control the majority of the voting stock of W&R, but admit that, on or about January 30, 1969, Waddell, Merriman and other shareholders of W&R agreed in principle to sell their shares of W&R stock to Continental at a selling price of $80 per share on condition that Continental make a public offer to purchase at the same price all of the outstanding shares of W&R of all classes provided Continental should obtain tender offers enabling it to acquire at least 80% of the total combined voting and non-voting common shares of W&R.

64. Deny the allegations of paragraph 64, except

Exhibit H

admit that, on or about January 30, 1969, the aforesaid proposed acquisition of the stock of W&R by Continental was unanimously approved by the directors of both W&R and United and that Waddell and Merriman participated in such meetings as directors of United and of W&R.

65. Deny the allegations of paragraph 65 except admit that defendants Waddell and Merriman own or control in the aggregate approximately 36.57% of the outstanding voting shares of W&R.

66. Admit, upon information and belief, the allegations of paragraph 66.

67 to 69. Deny the allegations of paragraphs 67 to 69, inclusive.

FIRST SUPPLEMENTAL DEFENSE

1. At all material times, W&R has provided investment advisory and/or management services to United pursuant to the provisions of various investment management contracts approved by United's shareholders, the presently effective contract having been approved by United's shareholders at their postponed annual meeting held June 26, 1968.

2. Under the terms of such investment management contracts and in accordance with the applicable provisions of the Investment Company Act of 1940, the proposed acquisition by Continental from the holders thereof, including the defendants Waddell, Merriman and Roach, of more than 50% of the outstanding voting stock of W&R, would effect an automatic termination of such investment management contract subject to the reinstatement of a new contract between United and W&R with the approval of the directors and shareholders of United.

3. Under the circumstances and solely for the aforementioned reasons, approval of the acquisition proposal by Continental was considered and approved by the directors of United on or about January 30, 1969. On information and belief, such approval was based solely on the business judgment of the directors of United relative to the type, quality and character of the investment advisory and management services which might be expected to be rendered by W&R under such new ownership without reference to the corporate interests of W&R or the personal interests of the officers, directors and shareholders of W&R.

4. After full and fair disclosure of all material or relevant matters and transactions by a notice of meeting and proxy statement dated April 18, 1969, the shareholders of United at their postponed annual meeting held June 3, 1969 overwhelmingly approved the re-employment of W&R as investment adviser and manager of United in the event that the existing contract between United and W&R should be terminated by the proposed acquisition by Continental of a majority of the voting shares of W&R.

5. Prior to its release and distribution, such proxy statement was submitted to the scrutiny of the Staff of the Commission. Such proxy statement fully and fairly disclosed all material or relevant matters and transactions concerned with the proposed acquisition by Continental of a majority of the voting stock of W&R, including:

(a) All material associations and affiliations of both the directors of United and of the persons

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owning, controlling or affiliated with the ownership of Continental.

(b) The identity and shareholdings of all of the principal owners of the voting shares of W&R.

(c) The terms of all recent material transactions in the stock of W&R by either such corporation, its officers, directors and/or controlling shareholders showing, inter alia, arm's-length transactions with disinterested third parties at $43 per share in January of 1968.

(d) All material terms of the proposed acquisition of control of W&R by Continental including a proposed price of $80 per share as well as the nature, assets and resources of the wholly and partially owned subsidiaries of W&R.

6. Neither plaintiffs nor any other shareholders of United protested or otherwise actively opposed the proposed acquisition by Continental.

7. Under the circumstances, all shareholders of United, including plaintiffs, are barred and estopped from complaint of the proposed acquisition by Continental including any and all of the matters set forth in the supplemental complaint herein.

SECOND SUPPLEMENTAL DEFENSE

1. On information and belief, plaintiffs have, at all times since January 31, 1969, been apprised of the material terms of the proposed acquisition by Continental.

2. The prosecution of the matters set forth in the supplemental complaint by plaintiffs is barred by laches.

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THIRD SUPPLEMENTAL DEFENSE

1. The proposal by Continental for the acquisition of all of the voting and non-voting stock of W&R at $80 per share, payable in cash, is dependent upon the tender of at least 80% of its outstanding shares.

2. In the event the defendants Waddell, Merriman or Roach are in any way restrained from selling or tendering their shares or dissuaded therefrom by the imposition of a trust on the proceeds thereof, the proposed acquisition and tender offer by Continental will fail for lack of sufficient shares, including particularly a sufficient number of the voting shares of W&R.

3. At the time the intentions of Continental to make a public tender offer for the shares of W&R at $80 per share were revealed, the non-voting shares were being publicly traded at a price of $66 bid and $68 asked with the result that the many public owners of the non-voting shares of W&R will or may be deprived of an option to avail themselves of such benefit without representation or participation in this action.

4. The prosecution of the matters and claims set forth in the supplemental complaint should be dismissed in the absence of indispensable parties including Continental and the public owners of the non-voting shares of W&R.

WHEREFORE, defendants demand judgment dismissing the supplemental complaint with costs and disbursements of

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this action together with such other, further and different relief as shall appear just and proper in the premises.

Dated: New York, N. Y.
June 16, 1969

VALICENTI LEIGHTON REID & PINE

By _____
Member of the Firm
Attorneys for Defendants
Waddell & Reed, Inc.,
Joe Jack Merriman,
Chauncey L. Waddell,
Cornelius Roach and
Kansas City Securities
Corporation
Office and P. O. Address
70 Pine Street
New York, New York 10005

TO: BASS & FRIEND, ESQS.
Attorneys for Plaintiff
342 Madison Avenue
New York, New York

KELLEY, DRYE, NEWHALL, MAGINNES & WARREN
Attorneys for Defendant United Funds, Inc.
Office and P. O. Address
350 Park Avenue
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SOPHIE RUSNAY,

Plaintiff,

-against-

JOE JACK MERRIMAN, et al.,

Defendants.

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SUPPLEMENTAL COMPLAINT

69 Civil 276

Plaintiff demands a trial by jury of all issues.

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JUL 7 1969
VALICENTI LEIGHTON REID & PINE

Pursuant to leave granted by order of this Court on July 2, 1969, plaintiff, by her attorney Joseph A. Rusnay, as and for her supplemental complaint alleges upon information and belief:

AS A SECOND SEPARATE AND DISTINCT CAUSE OF ACTION

29. Plaintiff repeats and realleges each and every allegation of paragraphs 1 through 28 inclusive, hereof, with the same force and effect as if fully set forth herein.

30. The defendant Waddell, individually or together with members of his family, owns over 31% of the Class B common voting stock of W & R; the defendant Merriman, individually or together with members of his family, owns over 20% of such stock; and the defendant Roach, individually or together with members of his family owns over 3% of such stock.

31. In or about January 1969 Continental Investment Corporation of Boston, Massachusetts offered to purchase, and said defendants Waddell, Merriman and Roach agreed to sell, the stock of W & R owned or controlled by them or by members of their respective families to Continental Investment Corporation for $80 per share. Said offer to

Exhibit J

purchase was subject to Continental Investment Corporation being tendered, pursuant to a tender offer to W & R's stockholders, over 50% of W & R's outstanding shares, and was also subject to the approval by the shareholders of the Fund of the change in control of W & R.

32. At or about said time the managements and Boards of Directors of the Fund and of W & R approved the aforesaid tender offer to purchase W & R stock.

33. The shares of such voting stock owned or controlled by said defendants Waddell, Morriman and Roach, or by members of their respective families, constitute voting control of W & R.

34. The high price offered or tendered by Continental Investment Corporation for W & R stock was and still is due to the high price-earnings ratio given to W & R stock by the market. The high price-earnings ratio of W & R stock is in turn attributable to the exceptionally large and constantly growing earnings of W & R in recent years and during the period covered by the complaint herein, which earnings are in large part due to the wrongful acts, transactions and practices complained of in this action.

35. A substantial portion of the increment in value of the W & R stock proposed to be sold as aforesaid by said defendants and other W & R stockholders belongs to and is an asset of the Fund and its stockholders; and the defendants Waddell, Morriman and Roach, in disregard of their fiduciary duties to the Fund and its shareholders, are planning, in conjunction with the other defendants herein, to convert such asset of the Fund to their own use and benefit.

WHEREFORE, the plaintiff prays for an order and

judgment:

(1) Enjoining and restraining the defendants, and each of them, and their respective servants, agents and employees, from disposing by sale, or by any other manner of transfer or disposition, any shares of W & R owned or held by them or by members of their respective families, to Continental Investment Corporation;

(2) or, in the alternative, directing that such shares of W & R stock, or the proceeds of any sale, transfer or other disposition thereof, to Continental Investment Corporation, shall be impressed with a trust for the benefit of the Fund and its shareholders;

(3) awarding the plaintiff the costs and expenses of this action, including reasonable counsel fees; and

(4) granting the plaintiff such other and further relief as may be just and proper in the premises.

S/JOSEPH A. ROSKAY
JOSEPH A. ROSKAY
Office & P.O. Address
122 East 42 Street
New York, N. Y. 10017
MUrray 7-3140

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SOPHIE RUSKAY,

Plaintiff,

-against-

JOE JACK MERRIMAN, CHAUNCEY L. WADDELL, CORNELIUS ROACH, CAMERON K. REED, ROBERT W. WAGNER, WADDELL & REED, INC., KANSAS CITY SECURITIES CORPORATION and UNITED FUNDS, INC.,

Defendants.

69 Civ. 276

ANSWER TO SUPPLEMENTAL COMPLAINT

Defendants Chauncey L. Waddell ("Waddell"), Joe Jack Merriman ("Merriman") and Cornelius Roach ("Roach"), by their undersigned attorneys, as their answer to plaintiff's supplemental complaint:

1. Deny the allegations of each paragraph of the supplemental complaint except as hereinafter specifically admitted or otherwise denied:

Paragraph	Specific Response
29	Repeat the admissions and denials contained in their answer with respect to paragraph "1" through "28", inclusive, of the complaint.
30	Deny except admit that, prior to July 1, 1969, the voting shares of W&R were owned 24.22% by Waddell, 12.35% by Merriman, 7.90% by members of Merriman's family, 6.83% by members of Waddell's family, and 3.88% by Roach.
31	Admitted except deny that Waddell, Merriman or Roach control or sold the voting shares of W&R owned by members of their respective familieis.
32	Admit only that, on or about January 30, 1969, the proposed acquisition of the stock of W&R by Continental was unanimously approved by the directors of both W&R and United.

FIRST SUPPLEMENTAL DEFENSE

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2. At all material times, W&R has provided investment advisory and/or management services to United pursuant to the provisions of various investment management contracts approved by United's shareholders, the presently effective contract having been approved by United's shareholders at their postponed annual meeting held June 26, 1968.

3. Under the terms of such investment management contracts and in accordance with the applicable provisions of the Investment Company Act of 1940, the proposed acquisition by Continental from the holders thereof, including the defendants Waddell, Merriman and Roach, of more than 50% of the outstanding voting stock of W&R, would effect an automatic termination of such investment management contract subject to the reinstatement of a new contract between United and W&R with the approval of the directors and shareholders of United.

4. Under the circumstances and solely for the aforementioned reasons, approval of the acquisition proposal by Continental was considered and approved by the directors of United on or about January 30, 1969. On information and belief, such approval was based solely on the business judgment of the directors of United relative to the type, quality and character of the investment advisory and management services which might be expected to be rendered by W&R under such new ownership without reference to the corporate interests of W&R or the personal interests of the officers, directors and shareholders of W&R.

5. After full and fair disclosure of all material or relevant matters and transactions by a notice of meeting and proxy statement dated April 18, 1969, the shareholders of United at their postponed annual meeting held June 3, 1969 overwhelmingly approved the re-employment of W&R as investment adviser and manager of United in the event that the existing contract between United and W&R should be terminated by the proposed acquisition by Continental of a majority of the voting shares of W&R.

6. Prior to its release and distribution, such proxy statement was submitted to the scrutiny of the Staff of the Commission . Such proxy statement fully and fairly disclosed all material or relevant matters and transactions concerned with the proposed acquisition by Continental of a majority of the voting shares of W&R, including:

(a) All material associations and affiliations of both the directors of United and of thepersons . owning, controlling or affiliated with the ownership of Continental.

(b) The identity and shareholdings of all of the principal owners of the voting shares of W&R.

(c) The terms of all recent material transactions in the stock of W&R by either such corporation, its officers, directors and/or controlling shareholders showing, inter alia, arm's-length transactions with disinterested third parties at $43 per share in January of 1968.

(d) All material terms of the proposed acquisition of control of W&R by Continental including a proposed

price of $80 per share as well as the nature, assets and resources of the wholly and partially owned subsidiaries of W&R.

7. Neither plaintiff nor any other shareholders of United protested or otherwise actively opposed the proposed acquisition by Continental.

8. Under the circumstances, all shareholders of United, including plaintiff, are barred and estopped from complaint of the proposed acquisition by Continental including any and all of the matters set forth in the supplemental complaint herein.

SECOND SUPPLEMENTAL DEFENSE

9. On information and belief, plaintiff has, at all times since January 31, 1969, been apprised of the material terms of the proposed acquisition by Continental.

10. The prosecution of the matters set forth in the supplemental complaint by plaintiff is barred by laches.

THIRD SUPPLEMENTAL DEFENSE

11. The proposal by Continental for the acquisition of all of the voting and non-voting stock of W&R at $80 per share, payable in cash, is dependent upon the tender of at least 80% of its outstanding shares.

12. In the event the defendants Waddell, Merriman or Roach are in any way restrained from selling or tendering their shares or dissuaded therefrom by the imposition of a trust on the proceeds theref, the proposed acquisition and

tender offer by Continental will fail for lack of sufficient shares, including particularly a sufficient number of the voting shares of W&R.

13. At the time the intentions of Continental to make a public tender offer for the shares of W&R at $80 per share were revealed, the non-voting shares were being publicly traded at a price of $66 bid and $68 asked with the result that the many public owners of the non-voting shares of W&R will or may be deprived of an option to avail themselves of such benefit without representation or participation in this action.

14. The prosecution of the matters and claims set forth in the supplemental complaint should be dismissed in the absence of indispensable parties including Continental and the public owners of the non-voting shares of W&R.

WHEREFORE, defendants demand judgment dismissing the supplemental complaint with costs and disbursements of this action, together with such other, further and different relief which shall appear just and proper in the premises.

Dated: New York, N. Y.
July 10, 1969

VALICENTI LEIGHTON REID & PINE

By _____
Member of the Firm

Attorneys for Defendants
Waddell, Merriman and Roach
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Tel: DI 4-2424

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRED HORENSTEIN and JOSEPH SCIUTO,

Plaintiffs,

-against-

WADDELL & REED, INC., JOE JACK MERRIMAN, CHAUNCEY L. WADDELL, CORNELIUS ROACH, UNITED FUNDS, INC., and KANSAS CITY SECURITIES CORPORATION,

Defendants.

67 Civ. 4175

ACTION NO. 1

SOPHIE RUSKAY,

Plaintiff,

-against-

JOE JACK MERRIMAN, CHAUNCEY L. WADDELL, CORNELIUS ROACH, CAMERON K. REED, ROBERT W. WAGNER, WADDELL & REED, INC., KANSAS CITY SECURITIES CORPORATION and UNITED FUNDS, INC.,

Defendants.

69 Civ. 276

ACTION NO. 2

STIPULATION OF SETTLEMENT

WHEREAS, the above captioned consolidated actions were initially instituted separately in this Court by the plaintiffs as shareholders of United Funds, Inc. ("United"), derivatively on behalf of United, and representatively on behalf of all of its shareholders; and

WHEREAS all of the above named defendants, other than Cameron K. Reed, have been served with process and appeared in both actions and have interposed answers to the complaints and supplemental complaints in both actions, disclaiming any wrongdoing or liability; and

WHEREAS, the complaint of the plaintiff in Action No. 1 has been further amended on consent to incorporate therein all of the claims and allegations set forth in the complaint of such plaintiffs in an action instituted by them in the Supreme Court of the State of New York for New York County entitled "Fred Horenstein and Joseph Sciuto, Plaintiffs, against Waddell & Reed, Inc., et al., Defendants" (Index No. 15233/68), prosecution of which was stayed by an order of that Court dated May 12, 1969 pending the final determination in this Court of Action No. 1; and

WHEREAS plaintiffs in both actions have conducted discovery proceedings by written interrogatories, oral depositions and proceedings for the production of documents sufficient and adequate to disclose all material facts and the circumstances or occurrence of the transactions alleged in their respective complaints; and

WHEREAS plaintiffs, as shareholders of United, consider that it is desirable to compromise and settle all claims alleged in their respective complaints in the manner and upon the terms and conditions hereinafter set forth and feel that such settlement is desirable and in the best interests of United and all of its shareholders; and

WHEREAS defendants consider that it is desirable and in the best interests of United, themselves and their respective shareholders to settle these actions upon the terms and conditions hereinafter set forth in order to avoid further expenses, inconvenience and the distraction of burdensome and protracted litigation;

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and among the undersigned, subject to the approval of the Court, that the above entitled consolidated actions and all claims asserted or which might have been asserted on the basis of the matters and transactions alleged therein be dismissed with prejudice and on the merits and that judgment be entered in favor of all the defendants who have or who shall have appeared herein prior to the entry of a final order and judgment approving the terms and provisions of this Stipulation of Settlement, upon the following terms and conditions:

1. Defendants will pay or cause to be paid to United, within thirty (30) days of the Effective Date hereof, the sum of One Hundred Fifty Thousand ($150,000) Dollars.

2. Kansas City Securities Corporation ("KCSC") or, if it shall fail to do so, Waddell & Reed, Inc. ("W&R") will pay to United the additional sum of One Hundred Thousand ($100,000) Dollars within thirty (30) days of the Effective Date hereof and a like sum of One Hundred Thousand ($100,000) Dollars within thirty (30) days of the next succeeding four (4) anniversaries of the Effective Date hereof; provided that, to the extent such payments are made by KCSC, they may be treated as a deduction in the computation of its "net income" for all purposes in which United is or may be concerned including the formula for the reduction of the management fee of W&R by a portion of the net income of KCSC derived directly or indirectly from commissions or discounts on the execution of the portfolio transactions of United pursuant to Article "5" of the investment advisory and

management contract presently in effect between United and W&R or the provisions of any subsequent similar contract.

3. Nothing herein contained shall be deemed to provide or imply that the terms of the investment advisory and management contract presently or hereafter in effect between W&R and United may not, with the approval of the shareholders of United, be varied, modified or amended in any or all of its particulars, provided that the monetary benefit to be conferred on United by the provisions of this Stipulation of Settlement shall not be reduced thereby.

4. The Effective Date of this Stipulation of Settlement, for the purpose of determining the date on which the defendants shall become subject to the obligations hereinabove set forth, shall be either:

(a) The date of expiration of the time to appeal, without an appeal having been taken, from (i) the entry by this Court of a final judgment approving and confirming this settlement and dismissing this action on the merits with prejudice to plaintiffs, to United and to all other shareholders of United and their respective heirs, successors in interest and assigns in favor of each of the defendants who have appeared in this action or who shall hereafter appear in this action at any time prior to the entry of such judgment; and (ii) the entry of a final judgment dismissing with prejudice the above-mentioned action of the Horenstein plaintiffs in the Supreme Court of the State of New York and so much of any action pending on the date of the approval of this Stipulation of Settlement in any Court on

behalf of United or its shareholders against any of the persons or corporations named as defendants in these consolidated actions as asserts or alleges any claim or claims alleged in any of the complaints or pleadings of the plaintiffs in these consolidated actions; or

(b) if an appeal be taken from either or both of the foregoing final judgments, the date of final decision by the last court(s) to which such appeal(s) can or may be prosecuted, disposing of such appeal(s) in such fashion as to permit the consummation of this Stipulation of Settlement in accordance with its terms and provisions.

5. The attorneys for plaintiffs shall promptly submit this Stipulation of Settlement to the Court for approval upon such notice to the shareholders of United as the Court may direct.

6. In the event the terms and provisions of this Stipulation of Settlement shall not be fully approved and confirmed by the Court, or if such approval and confirmation be modified or reversed on appeal, or any of the other conditions set forth in the subparagraphs of paragraph 4(a) or 4(b) hereof shall not be satisfied or waived by defendants, this Stipulation of Settlement shall become null and void, shall have no further force and effect, and shall not be used or referred to in any subsequent proceeding in these consolidated actions or in any other action or proceedings.

7. In the event the Court shall approve the terms and provisions of this Stipulation of Settlement, and the same

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shall become effective as otherwise hereinabove provided, an order and judgment shall be entered on consent of the parties effectuating the same; United shall execute and deliver to the defendants a release in the form annexed hereto; and the plaintiffs and/or their attorneys may apply to the Court for an allowance of the reasonable fees and expenses paid or incurred in the prosecution of the action to be paid by United not, however, in excess of the total amount of Two Hundred Twenty-five Thousand ($225,000) Dollars.

Dated: New York, N. Y.
December 24, 1969

BASS & FRIEND

By _____
Member of the Firm

and

_____
Monroe L. Inker
Attorneys for Plaintiffs
in Action No. 1

KELLEY DRYE NEWHALL MAGINNES
& WARREN

By _____
Member of the Firm
Attorneys for Defendant
United Funds, Inc.

_____
Joseph A. Ruskay
Attorney for Plaintiff
in Action No. 2

VALICENTI LEIGHTON REID & PINE

By _____
Member of the Firm
Attorneys for Defendants
Merriman, Waddell, Roach,
Wagner, Waddell & Reed, Inc.
and Kansas City Securities
Corporation.

EP

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRED HOHENSTEIN and JOSEPH SCIUTO,

Plaintiffs,

-against-

WADDELL AND REED, INC., JOE JACK MERRIMAN, CHAUNCEY L. WADDELL, CORNELIUS ROACH, UNITED FUNDS, INC., and KANSAS CITY SECURITIES CORPORATION,

Defendants.

67 Civ. 4175

ACTION NO. 1

SOPHIE RUSKAY,

Plaintiff,

-against-

JOE JACK MERRIMAN, CHAUNCEY L. WADDELL, CORNELIUS ROACH, CAMERON K. REED, ROBERT W. WAGNER, WADDELL & REED, INC., KANSAS CITY SECURITIES CORPORATION and UNITED FUNDS, INC.,

Defendants.

69 Civ. 276

ACTION NO. 2

MEMORANDUM IN SUPPORT OF PROPOSED SETTLEMENT ON BEHALF OF WADDELL & REED, INC. AND OTHER DEFENDANTS

VALICENTI LEIGHTON REID & PINE
70 PINE STREET
NEW YORK, N.Y. 10005

IV

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PLAINTIFFS' CHARGE THAT THE SALE BY DEFENDANTS WADDELL AND MERRIMAN OF THEIR CONTROLLING SHARES OF W&R TO CONTINENTAL WILL RESULT IN THEIR CONVERTING PAST AND FUTURE PROFITS BELONGING TO UNITED IS WITHOUT MERIT

Essentially, plaintiffs' charge that as a result of the alleged improprieties committed by W&R in allocating and directing United's brokerage, W&R has earned profits which rightfully belong to United. Thus, argue plaintiffs, the price tendered by Continental to W&R shareholders, which was based upon W&R earnings, enabled defendants Waddell and Merriman to convert to their own use past and future profits rightfully belonging to United.

Plaintiffs' charge is wholly devoid of merit. It is clear law that neither United nor any of its shareholders have or can claim a proprietary right in the shares of W&R. Indeed, the right of the shareholders of a mutual fund investment adviser to sell controlling shares of such company for a consideration in excess of the net asset value of their shares is well established.

In SEC v. Insurance Securities, Inc., 254 F. 2d 642, 650-651 (9 Cir. 1958), cert. den. 358 U.S. 823, 79 S. Ct. 38, 3 L. Ed. 2d 64, the United States Court of Appeals for the 9th Circuit opined:

> "It is no doubt realistic to attribute a large part of the value of the service company stock to the contract which it has with Trust Fund. But this value does not represent an asset of Trust Fund. . .
>
> . . .

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> "The price of the service company stock, over and above net asset value, is based largely upon the expectation that the service contract will be renewed and profits will continue to be received. This prospect no more represents an asset of Trust Fund than do the current profits to the service company, as received. The price received by appellee - directors for their stock in the service company did not come from the coffers of the investment company, but from outside purchasers."

The basis of the relationship existing between United and its shareholders with W&R is the Investment Advisory Agreement. Quite clearly, such Agreement does not purport to confer upon United or its shareholders a property right in W&R shares. On the contrary, the Investment Advisory Agreement specifically provides that in the event of its "assignment", the Agreement shall automatically terminate. [54] Thus, on June 3, 1969, at Kansas City, Missouri, a majority of the United shareholders entitled to vote at the annual shareholders meeting approved the re-employment of "W&R as investment adviser and manager under the contract then in effect if and when the contract is terminated due to its assignment." [55]

Moreover, the record amply demonstrates the efforts made by W&R's Board of Directors to assure itself that Continental was an acceptable purchaser, in that it had the capacity and responsibility to assume control of a mutual fund investment

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54. "Assignment" is defined in Section 2(a)(4) of the Investment Company Act of 1940 as "any direct or indirect transfer or hypothecation of a contract or chose in action by the assignor, or of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor."

55. Minutes of Annual Meeting of United Shareholders, June 3, 1969, pp. 5-6

advisory and management company.[56]

Additionally, it has been heretofore demonstrated that W&R's conduct in handling United's portfolio brokerage has been and continues to be well within the bounds of propriety from both a legally mandated and an industry imposed standard.

Thus, it is submitted that the prospect of plaintiffs' success on this cause of action, challenging the propriety of defendants Waddell and Merriman retaining the profits realized from their sale of W&R stock to Continental is extremely tenuous.

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56. See testimony of Chauncey L. Waddell, pp. 74-79, 87-88; and Joe Jack Merriman, pp. 37-39.
For an historical treatment of the sale of W&R to Continental See:

Plaintiffs' Exhibit 1, Continental Investment Corporation letter of intent, dated January 29, 1969.
Plaintiffs' Exhibit 2(a), Agreement between Continental Investment Corporation and Individual sellers of W&R Class B shares, dated March 13, 1969.
Plaintiffs' Exhibit 2(b), Amendment to aforementioned agreement, dated April, 1969.
Plaintiffs' Exhibit 3, Letter to Shareholders of W&R, dated March 14, 1969.
Plaintiffs' Exhibit 4, Letter to Shareholders of W&R, dated June 3, 1969.
Plaintiffs' Exhibit 5, Tender offer by Continental Investment Corporation, dated June 3, 1969.

Cert petition
4/3/72

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRED HORENSTEIN and JOSEPH SCIUTO, Plaintiffs, -against- WADDELL & REED, INC., et al., Defendants.	67 Civ. 4175 ACTION NO. 1
SOPHIE RUSKAY, Plaintiff, -against- JOE JACK MERRIMAN, et al., Defendants.	69 Civ. 276 ACTION NO. 2

STATEMENT OF DEFENDANTS' ATTORNEY ON SETTLEMENT HEARING

ALBERT D. JORDAN, being an attorney and member of the firm of attorneys appearing on behalf of certain of the defendants in the above-captioned consolidated actions, states:

1. These are consolidated shareholder actions brought on behalf of United Funds, Inc. ("United"), an open-end, managed investment company, commonly known as a mutual fund.

2. The defendant Waddell & Reed, Inc. ("W&R") is a New York corporation which supplies management and an investment program to United pursuant to the terms of an Investment Advisory Contract between itself and United. The defendant Kansas City Securities Corporation ("KCSC") is a wholly owned subsidiary of W&R which, since September 1,

New York County authorizing and approving the settlement of such prior actions. Prosecution of the New York action was stayed by an Order of that Court pending the disposition before this Court of plaintiffs' original actions for the reason that the terms of the prior Settlement Stipulation of the earlier New York actions incorporated a proposed Investment Advisory Agreement to be entered into between W&R and United which was identical in all respects with the Investment Advisory Agreement entered into with the approval of United's shareholders in April of 1965 with the result that the allegations of plaintiffs' original actions asserting that the brokerage operations of KCSC constituted a violation of such Investment Advisory Agreement presented issues identical with thosebeing litigated before this Court. Defendants contend that the allegations of the New York action are based on nothing more than a semantic distortion of the prior Settlement Stipulation and Order.*

7. Plaintiffs' supplemental action was instituted pursuant to an Order of Hon. Harold R. Tyler, Jr. dated May 29, 1969 authorizing the plaintiffs in Action No. 1 to serve a supplemental complaint. Pursuant to leave granted by Hon. Morris E. Lasker, a substantially identical supplemental complaint was served by plaintiff in Action No. 2.

* A stipulation for the settlement of the earlier New York actions provided that W&R would not "seek or accept compensation" greater than that provided by a reduced sliding scale for the computation of its management fee. However, as appears from the terms of the Settlement Stipulation read in conjunction with the then proposed new Investment Advisory Agreement, such stipulation did not and was not intended to refer to the operation of a securities brokerage affiliated with W&R.

Plaintiffs' supplemental action charges, in substance, that the defendants Waddell and Merriman, together with their families, owned or controlled a majority of the voting stock of W&R; that such defendants, in concert with Roach, arranged to sell all of their voting and non-voting stock of W&R at a price of $80 per share; and that such price reflected, in effect, a self-serving capitalization of the improper and illegal profits being earned by KCSC as a result of the matters and transactions previously alleged. In their answers to such supplemental complaints, the defendants dispute that any of them, either jointly or separately, owned or controlled a majority of the voting stock of W&R and pointed out that the sale of their shares of W&R was with the approval of United's shareholders at their annual meeting held June 3, 1969 after full and fair disclosure of all matters material to the transaction; that the sale of their W&R shares was pursuant to a public tender offer whereby all shareholders of W&R were offered the same price which they received; that United's shareholders have no right to enjoin or participate in the exercise by such defendants of their property right in the stock of W&R; and that, in any event, the remedies which United's shareholders might have by virtue of the allegations and charges of plaintiffs' actions would be in no way impaired by the sale of their W&R stock.

Prior Proceedings

Plaintiffs in these consolidated shareholder

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRED HORENSTEIN and JOSEPH SCIUTO,

Plaintiffs,

-against-

WADDELL & REED, INC., JOE JACK MERRIMAN, CHAUNCEY L. WADDELL, CORNELIUS ROACH, UNITED FUNDS, INC. and KANSAS CITY SECURITIES CORPORATION,

Defendants.

67 Civ. 4175

ACTION NO. 1

SOPHIE RUSKAY,

Plaintiff,

-against-

JOE JACK MERRIMAN, CHAUNCEY L. WADDELL, CORNELIUS ROACH, CAMERON K. REED, ROBERT W. WAGNER, WADDELL & REED, INC., KANSAS CITY SECURITIES CORPORATION and UNITED FUNDS, INC.,

Defendants.

69 Civ. 276

ACTION NO. 2

JUDGMENT AND ORDER

The parties, by their respective counsel, having entered into a stipulation of settlement and compromise, dated December 24, 1969, providing for dismissal on the merits of the above entitled consolidated stockholder derivative actions with prejudice to the plaintiffs therein, providing for certain payments to be made by the defendants to United Funds, Inc., the corporation on behalf of which such actions were instituted, and providing further for the execution and delivery to the defendants of a general release by United Funds, Inc. in the form annexed to such stipulation;

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And an application having been duly made to this Court for an order approving such stipulation as fair, reasonable and adequate; and the Court, by order dated December 24, 1969, having directed that a hearing into the fairness, reasonableness and adequacy of such stipulation of settlement and compromise be held on April 6, 1970, and that notice of the proposed settlement and hearing in the form approved by said order be given to the stockholders of United Funds, Inc. of record at the close of business on December 31, 1969, by mail on or before February 20, 1970;

And a hearing having been had pursuant to the aforesaid order and notice before the undersigned at the United States Courthouse in the Southern District of New York at 11:00 A.M. on April 6, 1970, at which an opportunity to be heard was given to all shareholders of United Funds, Inc. desiring to be heard; and the parties having appeared thereat by their respective counsel; and William W. George, E. W. Kelley, as Custodian for Karen Kay Kelley, T. H. Wilcox, Jr., F. Heizer Wright, as Trustee for Frances Wright, and Joan B. Sanger, by her attorneys, Markewich, Rosenhaus, Markewich & Friedman, Esqs., stockholders of United Funds, Inc. having been heard by letter and/or in person in opposition to the proposed settlement;

NOW, upon the aforesaid stipulation of settlement and compromise and the affidavit of Rodney O. McWhinney, sworn to March 6, 1970, showing compliance with the notice requirements of the aforesaid order of the Court, copies of which are annexed hereto; and upon all pleadings and

proceedings heretofore had in the above entitled actions; and upon the proofs submitted at the aforesaid hearing A 230 in support of said application including the statement of Albert D. Jordan, Esq., dated March 30, 1970, the affidavit of Solomon H. Friend, Esq., sworn to April 1, 1970, the affidavit of Joseph A. Ruskay, Esq., sworn to April 1, 1970, together with the exhibits and depositions referred to therein; and due consideration having been had thereon, and upon filing the memorandum decision of the Court, dated May 26, 1970 finding the aforesaid stipulation of settlement and compromise to be fair, reasonable and adequate; it is

ORDERED AND ADJUDGED that

1. The said application is granted in all respects;

2. The stipulation of settlement and compromise, dated December 24, 1969, is fair, reasonable and adequate;

3. The said stipulation shall be consummated by the parties thereto in accordance with its terms;

4. The above entitled shareholder actions and complaints therein be and they hereby are dismissed on the merits and with prejudice against the respective plaintiffs, United Funds, Inc., its successors and assigns and its stockholders; and this judgment is in full and final discharge of any and all claim or claims, or cause or causes of action, or part or parts thereof which are or might have been asserted with respect to the matters and transactions alleged in said complaints against the defendants Waddell & Reed, Inc., Joe Jack Merriman, Chauncey L. Waddell, Cornelius Roach,

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Kansas City Securities Corporation, Cameron K. Reed, Robert W. Wagner and United Funds, Inc.; and

5. Jurisdiction in these actions is reserved pending an application for attorneys' fees and expenses as provided for in paragraph 7 of the said stipulation of settlement.

Done ~~and~~ in New York, New York in the Southern District of New York this 25 day of June, 1970.

/s/ Morris E. Lasker
United States District Judge

Judgment Entered 6/25/70
John Livingston
Clerk

agency, and indeed the plaintiffs were venturing into virgin territory insofar as the securities laws are concerned. However, it was felt that the discovery proceedings would produce sufficient evidence to justify a court in "making new law."

As has been noted, supra, the discovery proceedings appeared to counsel to weaken, rather than to strengthen the factual basis upon which such new law was to be made. The defendants appeared ready, willing and able to proceed to litigation. In all candor, the opportunity of settling this litigation on a basis favorable to United came only at the point at which the shareholders of W & R, the largest of whom are the individual defendants herein, decided to sell W & R to Continental Investors Corporation. Suddenly, these lawsuits became burdens to the defendants, far in excess of the burdens theretofore possibly imposed by the law or the facts. Settlement of this action was largely facilitated, it is believed by counsel for the plaintiffs, by this unexpected turn of events. Counsel felt it their duty to the shareholders of United to take advantage of this situation and achieve a settlement which, it is believed, benefits United to a far greater extent than would a trial on the merits.

Furthermore, it is perhaps not unrealistic nor immodest to point out that this lawsuit brought to the attention of the Securities and Exchange Commission some of the "evils" inherent in the business of reciprocals and "give-ups". This lawsuit was the subject of extensive articles in Forbes magazine and The Wall Street Journal, and a copy of the complaint was delivered, shortly after the

United States Court of Appeals

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held a the United States Court House, in the City of New York, on the ninth day of May, one thousand nine hundred and seventy-seven.

SOPHIE RUSKAY, LOUIS FELDMAN, TRUSTEE, etc.,

Plaintiffs-Appellants

v.

CHAUNCEY L. WADELL, ETC.,

Defendants-Appellees

Docket No. 76-7270

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the plaintiffs-appellants, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Irving R. Kaufman

IRVING R. KAUFMAN, Chief Judge